In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 152

F. H. MASON, PETITIONER

v.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 16) is reported in 8 F. (2d) 56, and that of the Circuit Court of Appeals (R. 26) is reported in 13 F. (2d) 702.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1926. (R. 26.) A petition for rehearing was entertained and was denied October 7, 1926. (R. 30.) The petition for certiorari was filed December 14, 1926, and granted January 17, 1927 (R. 30), pursuant to Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

THE QUESTIONS

1. Under subdivision (b) of Section 31 of the Revenue Act of 1916 (added by the Revenue Act of 1917), providing that any distribution made to shareholders shall be deemed to have been made from the most recently accumulated profits and shall be taxed to the distributee at the rate prescribed for the year in which the profits were accumulated by the corporation, are distributions made to the shareholders during 1917 taxable to the shareholder at the 1917 rate if the corporation had no earnings for that year at the date of distribution sufficient to pay them but made sufficient earnings before the close of the year;

2. Is the date of the declaration of a dividend or the date of its payment the date of distribution within the meaning of Section 31 (b)?

THE STATUTE

The statute involved is Section 31 of the Revenue Act of 1916, added by Section 1211 of the Revenue Act of 1917 (Act of October 3, 1917, c. 63, 40 Stat. 300, 336–338), which provides:

> SEC. 1211. That Title I of such Act of September eighth, nineteen hundred and sixteen, is hereby amended by adding to Part III six new sections, as follows:
>
> * * * * *
>
> "SEC. 31(a). That the term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation, joint-stock company, associ-

ation, or insurance company, out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation, joint-stock company, association, or insurance company, which stock dividend shall be considered income, to the amount of the earnings or profits so distributed.

"(b) Any distribution made to the shareholders or members of a corporation, joint-stock company, or association, or insurance company, in the year nineteen hundred and seventeen, or subsequent tax years, shall be deemed to have been made from the most recently accumulated undivided profits or surplus, and shall constitute a part of the annual income of the distributees for the year in which received, and shall be taxed to the distributee at the rates prescribed by law for the years in which such profits or surplus were accumulated by the corporation, joint-stock company, association, or insurance company, but nothing herein shall be construed as taxing any earnings or profits accrued prior to March first, nineteen hundred and thirteen, but such earnings or profits may be distributed in stock dividends or otherwise, exempt from the tax, after the distribution of earnings and profits accrued since March first, nineteen hundred and thirteen, has been made. This subdivision shall not apply to any distribution made prior to August sixth, nineteen hundred and seventeen, out of earnings or profits accrued prior to March first, nineteen hundred and thirteen."

STATEMENT

This suit was brought to recover income taxes paid on certain corporate dividends received by petitioner from The B. F. Goodrich Company during 1917 and included in his return of income for that year. The dispute is over the rate at which such income was taxable. The statute to be applied is that above set forth.

The case was tried on a stipulation of facts (R. 6), which in some respects is inadequate. The dividends received by petitioner were as follows (R. 6, 7):

ON COMMON STOCK

Date of Declaration	Date of payment	Received by Mason
October 25, 1916	February 15, 1917	$22, 781. 00
January 24, 1917	May 15, 1917	22, 781. 00

ON PREFERRED STOCK

October 25, 1916	January 2, 1917	$17, 517. 50
January 24, 1917	April 2, 1917	17, 473. 75
January 24, 1917	July 2, 1917	17, 473. 75

The stipulation does not show whether the dividend resolutions directed that the dividends should be payable to the stockholders of record at the dates of the declarations, or at some later dates. These dividends were included by the petitioner in his income-tax return for 1917 (R. 12) made on the

receipts and disbursements basis, and reported by him as paid from surplus accumulated by the corporation during 1916, and he paid a tax thereon at the rates prescribed by law for 1916.

Thereafter the Commissioner of Internal Revenue levied an additional tax on the theory that the distributions of the dividends were made when the dividends were paid in 1917, not when they were declared, and that at the respective dates of payment there were net earnings accumulated during 1917 sufficient to pay the dividends, which were therefore presumed to be paid out of 1917 earnings and taxable at the 1917 rate, which was higher than for 1916. (R. 13.)

The stipulation shows that at the close of the year 1917, taking the year's business as a whole, the books of the corporation disclosed net earnings for 1917 in more than the amount of the dividends paid in 1917. (R. 11.) It also appears that agreements were made by The B. F. Goodrich Co. with dealers in its tires under which the bulk of the tires made between January 1 and July 1, 1917, were sent to dealers, and which provided that the dealers might return, under certain conditions, during September and October, 1917, tires they were unable to sell. (R. 9, 10.) It was stipulated that if these contracts did not amount to "firm sales," the company had no actual profits earned in 1917 prior to the date of dividend payments, and all of

its profits for 1917 were actually earned after the dividend payments. (R. 14.)

SUMMARY OF ARGUMENT

I. The decision of the Circuit Court of Appeals that the earnings for 1917, although shown to have been made after the dates of payment of the dividends, may be treated as the source of payment is submitted, but without support in this brief.

The decision in *Edwards* v. *Douglas*, 269 U. S. 204, does not go further than to hold that the earnings for the whole year may be pro rated to ascertain the current earnings at any date, if there is nothing to show such method inaccurate. The purpose of the statute does not require that the source of any dividend should be considered earnings made after the dividend was paid.

The regulations of the Treasury Department construed the statute to mean that only earnings made prior to a dividend payment should be treated as its source, and there is no good reason to overturn this settled practice.

II. The stipulation of facts adopted in the findings shows that at the respective dates of payment of the dividends no earnings for 1917 had been made.

III. A distribution was made, within the meaning of Section 31, when the dividend was paid, not when it was declared.

That was the interpretation of the statute promptly adopted in the Treasury regulations and since uniformly applied and no sufficient reason is advanced to reject the settled practice under a statute long since repealed.

Examples are given of incongruous results which would follow from the rule that the date of declaration of a dividend is the date of distribution.

The purpose of the statute, which was to treat the latest earnings as the source of dividends, would be defeated by treating the declaration of a dividend as a distribution made, where the payment of the dividend was postponed.

The propositions that a declaration of a dividend should be based on surplus then existing, and creates a debt owing to the stockholder, have no relation to the purpose of this statute or the question under consideration.

If declaration, not payment, is distribution, then the two dividends declared in 1916 must take the 1917 rate because not "distributions made in the year 1917 or thereafter," to which Section 31 applies.

That petitioner's theory that declaration is distribution leads to the result in this case that of the dividends paid in 1917 those declared in 1916 take the 1917 rate, while those declared in 1917 take the 1916 rate, a result which shows its lack of reason and justifies rejection.

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ARGUMENT

I

THE DIVIDENDS PAID IN 1917 SHOULD NOT BE TREATED AS PAID OUT OF 1917 EARNINGS, IF IT APPEARS THAT, IN FACT, AT THE DATE OF PAYMENT THERE WERE NO CURRENT EARNINGS, NOTWITHSTANDING THAT BEFORE THE CLOSE OF THE YEAR THERE WERE SUFFICIENT EARNINGS TO PAY SUCH DIVIDENDS

The Circuit Court of Appeals held that if the profits for the year 1917 disclosed at the end of the year were sufficient to cover the dividends paid during the year those dividends should be treated under Section 31(b) as paid out of 1917 earnings, notwithstanding it affirmatively appeared that at the date of payment no earnings had been made. This conclusion favored the Collector, and we submit the point, with the reasoning of the Circuit Court of Appeals to support it, for the decision of this Court, but we feel unable to urge this Court to affirm that decision.

The court below based its decision on the supposed authority of *Edwards* v. *Douglas,* 269 U. S. 204. While the decision in that case settled the point that the most recently accumulated undivided profits or surplus may be of the current year in which the distribution is made and not alone those accumulated up to the close of the preceding fiscal year, we think it was not decided that there need be no actual earnings for the current year at the date of distribution or that the earnings for the

year as a whole may be taken as a basis and prorated for the purpose of ascertaining current earnings available at the distribution date where there is affirmative evidence that no such current earnings in fact existed at the date of distribution. That case dealt with two dividends paid in September and December, 1917. The record in that case (pp. 32 and 33) shows that one dividend was declared September 13, to be paid September 28 to stockholders of record September 24, 1917. The other was declared December 13, to be paid December 28 to stockholders of record on December 18, 1917.

In that case the lower court had evidently proceeded on the theory that it was necessary to know whether current earnings were available at the date of payment of the dividends and, to ascertain that, had taken the earnings for the whole year and prorated them to determine the amount available at dates of distribution. It was not claimed in the brief for the United States that the 1917 distributions could be treated as paid out of 1917 earnings unless such earnings had been made prior to the distribution dates. There seemed to be no doubt on the record but that such earnings had been made and were available at the distribution dates. On the case as disclosed in that record the decision is authority for the proposition that a pro rata share of the entire year's earnings may be treated as approximating the actual earnings for a fraction of

the year, in the absence of circumstances showing that there were no earnings actually accumulated during the fractional period. It falls short of being authority for the claim that the unit and prorating method may be used where it affirmatively appears, as in this case, that no earnings were actually accumulated for the year until after the distributions were made. The decision left that question open. The point seems to have been carefully guarded and reserved for future consideration, because the opinion says (p. 208):

> There was no suggestion by the Douglas estate that, when these dividends were paid, the current undistributed 1917 earnings of the corporation then accrued were in fact insufficient to pay the two dividends. The District Court found that, under a pro rata apportionment, they were "more than sufficient." It is not suggested that the approximate amount of the undivided current earnings of 1917 accrued and undivided at the times these dividends were paid was not in fact known to be sufficient for this purpose. Nor is it suggested by the Douglas estate that the exact facts, or the knowledge thereof by the corporation at the times when the dividends were declared or paid, are of legal significance.

The purpose of the statute does not require a construction to the effect that a dividend paid during 1917 must be treated as paid out of 1917 earnings and bear the high 1917 rate, if when the dividend

was paid no such earnings were available for its payment. The object of the statute is accomplished if the dividend is treated as paid out of the earnings most recently accumulated in fact at the time of the payment, and does not require an assumption that the dividend was paid out of earnings which were not in fact made or accumulated until after the payment. The sound rule seems to be that the amount available out of current earnings for payment of dividends up to the actual date of distribution may be determined, where the method of accounting makes it possible by disclosing on the corporate books the approximate earnings in each month, by proof in that form, and if that kind of evidence is not available the amount of current earnings at any particular period in the year may properly be taken to be a pro rata share of the entire year's earnings, provided there is nothing persuasive to show that the fact is otherwise or the method inaccurate.

Besides, the contrary rule would conflict with the regulations and practice of the Treasury Department from the time when the law of 1917 went into effect until the Circuit Court of Appeals rendered its decision in this case. Article 107 of Regulations 33, Revised, issued January 2, 1918, was as follows (pp. 61–62):

> If a corporation distributed dividends in 1917, such dividends will be deemed to have been paid from the earnings of 1917, and the

> recipient, if an individual, will be liable to additional tax, if any, and if a corporation, to income tax, at the rates for the year 1917, unless it is shown to the satisfaction of the Commissioner of Internal Revenue *that at the time such dividends were paid, the earnings up to that time were not sufficient to cover the distribution,* in which case the excess over the earnings of the taxable year will be deemed to have been paid from the most recently accumulated surplus of prior years, and will be taxed at the rate or rates for the year or years in which earned. (Italics ours.)

By this regulation the Bureau of Internal Revenue adopted the view that it was necessary to know the current earnings up to the date of distribution and that earnings after that date could not be treated as applicable to the distribution. That interpretation of the law has been followed consistently by the Treasury Department down to the date of the decision of the Circuit Court of Appeals in this case. We are not able to see any good reason for disturbing the settled practice of the Treasury Department.

Again, the idea that only earnings actually made up to date of distribution could be considered was immediately accepted by Congress in enacting the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1060, in Section 201(e), which was as follows:

> Any distribution made during the first sixty days of any taxable year shall be deemed to have been made from earnings or profits accumulated during preceding taxable years; but any distribution made during the remainder of the taxable year shall be deemed to have been made from earnings or profits accumulated between the close of the preceding taxable year and the date of distribution, to the extent of such earnings or profits, and if the books of the corporation do not show the amount of such earnings or profits, the earnings or profits for the accounting period within which the distribution was made shall be deemed to have been accumulated ratably during such period.

Although the 1918 Act repealed the provision of the 1917 Act we are considering, and Section 201 (e) was useful principally in determining whether invested capital had been reduced by dividends, the section may also have been intended to determine what year's profits stock dividends (dealt with in Section 201 (d) on the theory they were taxable as income) were paid from, and in any event shows the ready acquiescence of Congress in the construction of the 1917 Act theretofore adopted by the Treasury Department.

This is also a plain case for the application of the rule that doubt of the meaning of a taxing statute should be resolved in favor of the taxpayer.

II

ACCEPTING THE COLLECTOR'S VIEW THAT THE DATE OF THE DISTRIBUTION REFERRED TO IN THE STATUTE IS THE DATE OF PAYMENT AND NOT THE DATE OF DECLARATION OF THE DIVIDEND, THERE WERE NO 1917 EARNINGS AVAILABLE ON THE DATES OF DISTRIBUTION

Assuming that only actual current earnings to date of distribution and not those accumulated subsequent to distribution during the same fiscal year may be treated as the source of the distribution, and assuming, also, that a distribution is made within the meaning of the statute when the dividend is paid and not when it is declared, the question of fact arises in this case whether at the respective dates of payment of the dividends there were any current 1917 earnings. This case was determined on stipulated facts (R. 6), which were adopted as the findings of the court (R. 16). It appears from that stipulation that The B. F. Goodrich Company, for special reasons present in 1917, shipped out to dealers large quantities of tires, under contracts, which provided (R. 9) that in September and October dealers should have the privilege of returning the tires in good order which they had not disposed of. By subsequent arrangement the dealers were required to determine by August 15, 1917, what tires they desired to return. (R. 11.) While the corporation immediately on the shipment set up the selling price of the tires in accounts receivable, keeping its books on an accrual basis (R. 14), at

the end of the year, or as soon as tires were returned, the amount of the accounts receivable were reduced on the books in accordance with the quantity of tires returned. The stipulation states (R. 14):

> It is agreed that if, upon the execution of the special contract between The B. F. Goodrich Company and its dealers, hereinabove set forth, deliveries of tires thereunder at once became and constituted firm sales, the Company had on the dates of payment of dividends here in question profits, earned but not received, for the year 1917 equal to or in excess of the amount of said dividends; but if the deliveries under said special contract did not constitute firm sales, the Company did not have any profits for such year on the dates of the payment of the dividends here in question.

The stipulation is in many respects inadequate and unsatisfactory. It is obvious that whether or not a sale was a firm sale on delivery of the tire to the dealer, it became such when the dealer sold or used the tire. There is nothing in the stipulation indicating what tires had been actually disposed of by dealers prior to the dividend-payment dates, and we can not resist the conclusion, taking the stipulation as a whole, that if this subject had been gone into valuable information would have been obtained; but we must take the stipulation as we find it, and we can not assert that a sale was a firm sale at a time when the dealer had a right, at his own

pleasure, to return the merchandise, and in the face of the express terms of this stipulation we can not see how it can be contended that on the dates of payment of these dividends any 1917 earnings had in fact been made. It may seem that this disposes of the case and makes it unnecessary to consider whether a distribution was made within the meaning of the statute when the dividend was paid or when it was declared, but this is not so, and it is necessary to pass on the point for the reasons disclosed in the next portion of this brief.

III

A DISTRIBUTION WAS MADE WITHIN THE MEANING OF THE STATUTE NOT WHEN THE RESOLUTION WAS PASSED DECLARING THE DIVIDEND BUT WHEN PAYMENT WAS MADE TO THE STOCKHOLDERS

The decision in *Edwards* v. *Douglas, supra,* does not dispose of this point. In that case, since so short a time elapsed between declaration and payment and both events occurred in the same year, the question whether the date of declaration or date of payment should be considered as the date of distribution was not important and was not presented or decided. The opinion speaks of the date of payment as the date of distribution, and thus, we think, naturally adopted the ordinary meaning of the word "distribution," but it can not be said that the point was involved or decided.

It is evident that Congress intended that the source of any dividend should be considered the earnings accumulated last in point of time, and prior to the date of distribution, and the question for decision is whether that means prior to the date of declaration or prior to the date of payment.

It may be admitted that the intention of Congress as to the meaning of the words "distribution made" is not clear. This uncertainty may not be disposed of by applying the rule that ambiguities in tax statutes are to be resolved in favor of the taxpayer, because some taxpayers would be benefited by one interpretation and other taxpayers by the other, depending upon their peculiar circumstances. In the case at bar, for instance, it would be to the advantage of the petitioner, under the particular facts of this case, if it were held that the date of payment is the date of distribution, as will be pointed out shortly. It is therefore necessary to consider everything which points to the probable intention of Congress.

The petitioner's principal argument is that, ordinarily, the declaration of a dividend fixes the rights of the stockholder as between him and the corporation and creates a debt of the corporation, and that in declaring a dividend the available surplus at the time of declaration must be the basis. This is all true enough, but these matters have no direct relation to the purpose of the statute here under consideration or to the problem here dealt with.

Another argument, largely relied on by the petitioner, is based on the last sentence in subdivision (b) of Section 31 to the effect that—

> This subdivision shall not apply to any distribution made prior to August sixth, nineteen hundred and seventeen, out of earnings or profits accrued prior to March first, nineteen hundred and thirteen.

The petitioner points out that this sentence was added to protect those who had made distributions in good faith prior to August 6, 1917 (the date when the proposed retroactive provisions of Section 31 were made public), by resolutions declaring that the dividends should be considered payable out of profits accrued prior to March 1, 1913, in reliance on existing law, the 1916 Act, which allowed such dividends free of tax to the stockholders if the board of directors specified that the dividends should be paid out of the profits accrued prior to March 1, 1913, even though there were available profits accumulated later. It is urged that if the words "distribution made" be construed to refer to the date of payment rather than to the date of declaration, the purpose of this last sentence in subdivision (b) would be defeated, in that it would fail to protect those who declared dividends prior to August 6th payable after that date. This argument has some force, but it proceeds on the assumption that such a resolution declaring a dividend would have been irrevocable, and this can not be conceded.

Generally speaking, an absolute and unconditional declaration of a dividend, not made under mistake or misapprehension, creates a right in the stockholder and is not subject to rescission by the corporation; but there are exceptions to this rule, and if a board of directors of a corporation, prior to August 6, 1917, proceeding on the assumption that under existing statutes they could declare a tax-free dividend to their stockholders out of profits accumulated prior to March 1, 1913, had passed a resolution to that effect specifying that the dividends should be treated as paid out of such profits, and had by their resolution deferred the actual payment until after August 6th, and then learned that a bill was pending in Congress and about to become law which would retroactively repeal the statute under which they had acted, nullifying the effect of their specification of the profits out of which the dividends were to be paid and defeating the purpose of the resolution by making the dividend subject to an enormous income tax instead of being tax free as contemplated, we have no doubt that a rescission of the dividend resolution by the board prior to the payment date would have been proper and sustained by any court. This subject is too remote from the questions here involved to justify further consideration. Something on the subject will be found in Thompson on Corporations, 3d Ed., Vol. 7, Section 5276. If such a resolution was revocable when pending legislation became public on

August 6th, the entire argument of the petitioner along this line fails.

Considerations which support the view that the distribution was made, within the meaning of this statute, when the dividend was paid and not when it was declared, are as follows:

(1) The words "distribution made" in their ordinary sense convey the idea that the money or property has been actually distributed in the sense of being placed in the hands of the distributee. The brief of *amici curiae* has furnished an illustration of such use in citing (p. 7) Section 58 of the New York stock corporation law. That section is as follows:

> No stock corporation shall declare or pay any dividend which shall impair its capital or capital stock, nor while its capital or capital stock is impaired, nor shall any such corporation declare or pay any dividend or make any distribution of assets to any of its stockholders, whether upon a reduction of the number of its shares or of its capital or capital stock, unless the value of its assets remaining after the payment of such dividend, or after such distribution of assets, as the case may be, shall be at least equal to the aggregate amount of its debts and liabilities including capital or capital stock as the case may be. In case any such dividend shall be paid, or any such distribution of assets made, the directors in whose administration the same shall have been declared or made, except those who may have caused their dissent therefrom to be entered upon

> the minutes of the meetings of directors at the time or who were not present when such action was taken, shall be liable jointly and severally to such corporation and to the creditors thereof to the full amount of any loss sustained by such corporation or by its creditors respectively by reason of such dividend or distribution.

Here the expression "make any distribution" and the word "distribution" are plainly used as applying not to the declaration of the dividend but to the actual delivery of assets to the stockholders. In that section the New York Legislature has used the term "distribution" in the sense contended for by the United States in this case. The section also suggests that the reason Congress used the term "distribution made" instead of "dividend paid" was because the term "dividend paid" was more appropriate to a dividend paid in money, and some dividends are in property, and the term "distribution made" would be broad enough to include both.

(2) The purpose of the statute is best served by treating a dividend as paid out of current earnings available when it was actually paid. The purpose of the statute was to treat all dividends as paid out of the very latest earnings available, and this purpose would be defeated if dividends declared early in 1917, long before the dates fixed for their payment, would escape the high 1917 rate because there were no current earnings available at declaration, although such earnings were in hand when the time

of payment arrived and were actually then available for payment. Such a construction would have opened the doors wide to evasion.

The law was not in force long enough for that to be attempted, but that does not weaken the force of the argument. Many corporations declare dividends long in advance of the payment dates. Surplus funds, which form the basis for declaration of dividends, are frequently nonliquid because invested in plant, equipment, or materials. Deferring payment of a dividend is often for the purpose of waiting for cash out of current earnings. There is no reason why the stockholders of one corporation having current earnings in June, 1917, should escape with the 1916 rate on a dividend declared January 2, 1917, and payable June 30, while the stockholders of another corporation, under similar conditions, are forced to pay the 1917 rate because their dividend was declared June 30 and paid the same date. Inequalities resulting from taking the date of declaration are well illustrated by the case of *A. H. Stange* (1 B. T. A. 810), where a dividend was declared on January 27, 1917, the amount being stated in the resolution "to be paid to the stockholders when and as directed by officers or directors." Portions of this amount were paid in August, 1917, and some not until 1918 and 1919. This decision, cited by the petitioner, is plainly unsound on any theory for the reason that the declaration never became final or effective until such time as the officers or directors took further

action; but, aside from that, it discloses the defeat of the purpose of the statute under consideration where the passage of a resolution declaring a dividend is treated as the making of the distribution.

3. From the beginning the Treasury Department construed the statute to mean that the distribution is made when the dividend is paid. Article 107 of Treasury Regulations No. 33 (above quoted), relied upon to show the practice of the Department on the other point involved in this case, treats the payment of the dividend as the distribution. Until the Board of Tax Appeals decided the *Stange* case in 1925 this Regulation was applied and enforced uniformly. The decision of the Board of Tax Appeals in the *Stange* case and in the other cases following it, cited by the petitioner, are now being contested in the courts by the Bureau of Internal Revenue. No argument has been adduced by the petitioner persuasive enough to justify rejecting the interpretation of this statute which was promptly adopted by the Treasury Department announced in its Regulations, and applied over a long term of years to innumerable cases.

4. The statute makes a dividend income to the stockholder when received, not when declared, and it seems inconsistent to speak of a distribution as having been made before the stockholder gets it as income. One who, under the 1916 Act, kept his accounts and made his returns on a cash basis would not deal with dividends as income until received, and we doubt if it has ever been customary for a

stockholder keeping his accounts on an accrual basis to enter up as an accrued account receivable the amount of dividends declared on his stock, discounted to present worth, immediately on the declaration of the dividend, and before payment.

5. In subdivision (a) of Section 31 it is said:

> That the term "dividends" as used in this title shall be held to mean any *distribution made or ordered to be made* by a corporation * * *.

The words we have italicized suggest that Congress understood a dividend paid to be a distribution made and a dividend declared to be a distribution ordered. In subdivision (b) only the words "distribution made" were used, and the phrase "distribution ordered to be made" was omitted. This argument, while not convincing, has some force.

6. The term "distribution made" is used in several places in Section 31(a) and (b). The words should not be given different meanings where used in different parts of the statute. Subdivision (b) provides:

> Any distribution made to the shareholders or members of a corporation, joint-stock company, or association, or insurance company in the year nineteen hundred and seventeen, or subsequent tax years, shall be deemed to have been made from the most recently accumulated undivided profits or surplus,

and shall be taxed at the rate prescribed by law for the years in which the profits were accumulated. The special provision of this statute giving the benefit of the tax rate in effect when the surplus was accumulated *applies only to distributions made in the year 1917 and thereafter.* A distribution made in 1916 is not within the terms of the section.

Two of the dividends involved in this case were declared in 1916, payable in 1917. If the petitioner is right in contending that the distribution is made within the meaning of this statute when the dividend is declared, then these two distributions were made in 1916 and Section 31 (b) does not apply to them, and there is no statute applicable to those distributions changing the ordinary rule that the rate of taxation is that for the year in which the dividend is received and for which the return is made. The petitioner's brief is silent on this subject, although the point was raised in the Government's brief at the time of the application for certiorari. Under the petitioner's theory that a distribution is made within the meaning of the statute when the dividend is declared, a dividend declared December 31, 1916, payable March 1, 1917, would be subject to the general rule and take the 1917 tax rate, notwithstanding the corporation had no earnings for 1917, while if the dividend were declared January 2, 1917, payable March 1, 1917, under Section 31 (b) the dividend would take the 1916 or an earlier rate, there being no 1917 earnings, and in the case at bar, on petitioner's theory that declaration is distribu-

tion, dividends declared in 1916 payable in 1917 take the 1917 rate, while those declared in 1917 paid that year take the 1916 rate. When it comes to testing the respective position of the parties by incongruous results, no illustration or suggestion made by the petitioner attacking the operation of the rule the Collector contends for, is so striking as this. Congress certainly did not intend such a result.

In this connection it will be noted that in the present case it would be to the advantage of the United States to have the rule adopted that declaration is distribution, because under that rule two of the dividends here involved declared in 1916 would certainly take the 1917 rate because not covered by Section 31, whereas under the rule that payment is distribution all of these dividends will take the 1916 rate, if we are right in our suggestion that only earnings accrued prior to the actual payment are treated as distributed. The petitioner in arguing that declaration and not payment is distribution seems to be contending against his own interest.

The interest of the United States is not to win this case but to have rules adopted for general application which are sound and consistent with the statute, and which will not disturb the established practice of the Bureau of Internal Revenue and reopen large numbers of cases under a statute long since repealed.

CONCLUSION

If this Court adopts the views of the Circuit Court of Appeals in all respects the result will be an affirmance. If it is held that only earnings actually accrued for 1917 up to the dates of distribution should be treated as the source of the distributions, and it is also held that payment is distribution, the judgment will have to be reversed and the recovery awarded by the District Court affirmed. If only earnings actually accrued for 1917 up to the dates of the distributions are treated as their source, but the declaration of the dividend and not the payment is considered the distribution date, then neither the judgment of the Circuit Court of Appeals nor the District Court would be accepted, and the case would have to be remanded with instructions to proceed on the theory that the dividends declared in 1917 are to take the 1916 rate, but the dividends declared in 1916, not being covered by Section 31, are to take the 1917 rate.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

SEPTEMBER, 1927.

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